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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION 3

In re the Marriage of ANN S. CARRINO  
and VINCENT CARRINO.

ANN S. CARRINO,

Appellant,

v.

VINCENT CARRINO,

Respondent;

RICHARD C. BERRA,

Objector and Respondent.

A124724

(San Mateo County  
Super. Ct. No. 070737)

Ann S. Carrino (Ann)<sup>1</sup> appeals from the trial court's order reallocating a private judge's fees to require her to pay \$21,936 that her former husband, Vincent Carrino (Vincent), failed to pay to the judge. She contends that because judgment had already been entered in the case, the court lacked authority to reallocate fees incurred before judgment was entered. For the reasons set forth below, we reverse the trial court's order.

**FACTUAL AND PROCEDURAL BACKGROUND**

Ann and Vincent were married in April 1990 and separated in June 2002. Vincent filed a petition for dissolution on June 17, 2002. On September 6, 2002, the parties and their respective attorneys filed a signed stipulation (the Stipulation) appointing Richard C.

<sup>1</sup> For clarity and ease of reference, we refer to the parties by their first names. (See *In re Marriage of Green* (1992) 6 Cal.App.4th 584, 588, fn. 1.)

Berra, Esq. (Judge Berra), to “hear and conduct a trial of all issues presented in this matter which shall include hearing and determining all pre-trial motions and discovery matters and presiding over the trial until rendition of a final judgment on all issues raised in the Petition for Dissolution and Response thereto.” Paragraph 5.a. of the Stipulation stated with respect to payment of Judge Berra’s fees, “The compensation of the Temporary Judge shall be pursuant to this Stipulation appointing said Temporary Judge and shall not create a contractual obligation between the parties and the Temporary Judge. Said Temporary Judge shall be allowed to recuse himself at anytime during the pendency of this proceeding in his sole discretion for any reason whatsoever. Each party shall be equally responsible for the payment of compensation of the Temporary Judge unless otherwise agreed to in writing by the parties or [by] court order. Any disputes regarding the payment of the Temporary Judge’s fees shall be resolved by the Presiding Judge of the Superior Court.”

Paragraph 5.c. of the Stipulation provided: “Unpaid Fees and Costs: [¶] Any sums due and unpaid to the Temporary Judge and to the reporter by any party or parties as to this case shall be included in and ordered paid as part of taxable costs herein in the judgment rendered in this proceeding.”

The case was divided into three phases and three trials were held before Judge Berra. On September 21, 2006, Judge Berra issued an “Order re Statement of Decision and Judgment for Phase I of Trial” (Phase I Decision). On October 19, 2006, he issued a “Statement of Decision Regarding Phase II Trial of Bifurcated Issues” (Phase II Decision). Both the Phase I Decision and Phase II Decision contained the following provision: “Pursuant to California Rules of Court, Rule 232.5, no Judgment shall be prepared . . . until all other issues are tried and one judgment on all issues can be entered.” On August 19, 2008, Judge Berra issued a “Statement of Decision Phase III” (Phase III Decision). The Phase III Decision stated the trial was held “to determine all of the outstanding property division and support issues not otherwise resolved by the proceedings set forth above,” i.e., the Phase I Decision, Phase II Decision and other orders and stipulations.

On August 20, 2008, Judge Berra sent an email to Vincent’s attorney, Mr. Pachkowski, and one of Ann’s attorneys, Mr. Moore, stating: “Counsel, Mr. Carrino’s

account with this office is seriously delinquent. Are there funds still left in Mr. Pachkowski's trust account? If I can't become current somehow, I will have to recuse myself." On September 22, 2008, Judge Berra held a telephonic case management conference during which Ann's other attorney, Mr. Flicker, asked Mr. Pachkowski whether Judge Berra's outstanding fees had been paid. Mr. Pachkowski responded, "I can't talk about it." Mr. Flicker said words to the effect, "What do you mean you can't talk about it? Money was ordered set aside in your trust account to pay for fees and costs, and we have never been given an accounting of that account."<sup>2</sup> Mr. Pachkowski responded, "I can't talk about it." Mr. Flicker then said words to the effect, "Not only do I think that Respondent is entitled to an accounting, but [Judge Berra] is entitled to that accounting especially if [his] fees have not been paid." Judge Berra interjected with words to the effect, "You don't need to worry about whether I need an accounting. I can handle that for myself."<sup>3</sup> Judge Berra then signed a "Judgment on Reserved Issues" (the Judgment), which provided in part: "The Court has made a series of findings and decisions in the trial of this action, which was conducted in three phases, and which are set forth in its Phase I, II and III Decisions, which are attached hereto and which are affirmed and incorporated herein by this reference." Various other stipulations and orders relating to property division, child custody and visitation, child support, spousal support, attorney's fees and costs, and sanctions, were also attached to the Judgment. The Judgment was filed and entered on September 23, 2008, and a Notice of Entry of Judgment was mailed that day.

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<sup>2</sup> The record indicates Judge Berra issued an order on May 5, 2008, requiring Vincent to pay \$100,000 to Mr. Pachkowski, "who will deposit such sums into . . . his attorney trust account" for the payment of fees and costs.

<sup>3</sup> The facts relating to what occurred at the case management conference are taken from a declaration Mr. Moore submitted to the trial court. Judge Berra acknowledged this discussion took place, when he told the court, "When I was asked by Mr. Moore don't you want [to] deal with the fees at the time we had the case management conference and decided . . . I will take care of myself on that. If I was naive enough as Mr. Moore seems to think I was not included in the judgment, so be it. It is a lesson that I won't forget and I will not do it again. That is for sure."

On October 27, 2008, Judge Berra filed an “Order to Show Cause Re Judge Pro Tem Fees,” which stated: “Respondent Ann S. Carrino is hereby ordered to appear and give any legal reason why this court should not order respondent to advance petitioner’s share of the outstanding judge pro tem fees in the amount of \$21,936.87. The hearing shall . . . be based on Family Code section 2030, paragraph 5.a. of the Stipulation for Appointment of Judge Pro Tem filed herein on September 6, 2002 and the attached Statement detailing the amount currently owed by Petitioner.”<sup>4</sup> Judge Berra recused himself from the case on December 4, 2008.

Ann filed a response to the Order to Show Cause in which she argued the court “is without jurisdiction to order any further shifting of fees for services rendered or costs incurred up through the date of entry of Judgment (September 23, 2008).” She also argued “the Stipulation for Appointment of Judge Pro Tem . . . specifically directs, in paragraph 5.c., that ‘Any sums due and unpaid to the Temporary Judge . . . by any party or parties to this case shall be included in and ordered paid as part of taxable costs herein in the judgment rendered in these proceedings,’ but they were not, and [Judge Berra] specifically rebuffed Respondent’s counsel’s specific inquiry in this issue during the Case Management Conference held on September 22 concerning finalizing the form of judgment in this matter.”

A hearing on Judge Berra’s request to reallocate fees was held on January 7, 2009, and the court issued its order on January 21, 2009. The order stated, “At the hearing the issue of compliance with Judge Berra’s order of May 5, 2008 was raised. In that order, Judge Berra ordered the withdrawal of \$100,000 from ‘cash available in any other non-retirement bank or brokerage account’ in [Vincent’s name] and the deposit of said amount in [Vincent’s] counsel[’]s trust account.” The court stated it was unclear whether a trust account exists or “whether any deposits were made consistent with the court order.” The court continued, “Regarding Judge Berra’s motion, the stipulation to his services in this case quite clearly gives him the authority to reallocate fees subject to disputes being heard

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<sup>4</sup> Judge Berra later informed the court that he erroneously relied on Family Code section 2030 and asked the court to disregard his citation to that section.

in the Family Law court. His reasons for the reallocation, as set forth on the record, are compelling. This court orders [Ann] to pay \$21,936 to Judge Berra forthwith.”

### DISCUSSION

Ann contends that because judgment had already been entered in the case, the trial court lacked authority to reallocate fees incurred before judgment was entered. She relies on *In re Marriage of Mulhern* (1973) 29 Cal.App.3d 988, 994, which held with respect to attorney’s fees that “proceedings subsequent to judgment may not result in an award of fees for services rendered prior to that judgment,” and Hogoboom & King, California Practice Guide: Family Law (The Rutter Group 2008) paragraph 14.9, page 14-3, which provides that “[a]bsent a reservation of jurisdiction, future attorney fee orders cannot be entered to account for legal services rendered prior to the judgment.” She also relies on cases, including *Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1237 [“ ‘once a judgment has been entered, the trial court loses its unrestricted power to change that judgment’ ”], and *Ramon v. Aerospace Corp.* (1996) 50 Cal.App.4th 1233, 1236 [after entry of judgment, a trial court “ ‘may correct judicial error only through certain limited procedures such as motions for new trial and motions to vacate the judgment’ ”], that stand for the proposition that a trial court’s power to modify a judgment is limited. Finally, she relies on paragraph 5.c. of the Stipulation, which provides that “[a]ny sums due and unpaid to the Temporary Judge . . . *shall* be included in and ordered paid as part of taxable costs herein in the judgment rendered in this proceeding.” (Italics added.) She argues that because Judge Berra did not include his unpaid fees in the Judgment, he was not entitled to seek payment of those fees after the Judgment was entered.

Judge Berra does not dispute that had *final judgment* been entered, the trial court would have lacked authority to reallocate fees incurred before judgment. He also does not dispute that the Stipulation required “[a]ny sums due and unpaid” to be included in “the judgment rendered in this proceeding.” He argues, however, that the trial court had authority to reallocate his fees and that he was not required to include the unpaid fees in the

Judgment because the Judgment was not a “final judgment,” but an “interlocutory” one.<sup>5</sup> He relies on *In re Marriage of Griffin* (1993) 15 Cal.App.4th 685 (*Griffin*), in which the Court of Appeal dismissed the wife’s appeal from an order denying her motion to correct a minute order on the ground that final judgment had not been entered. *Griffin* held the order was not appealable because “[t]here is no final judgment herein. Many issues, including spousal support and other property issues remain to be tried or resolved.” (*Id.* at p. 687.)

Unlike in *Griffin*, “[m]any issues” do not “remain to be tried or resolved” in this case. (*Griffin, supra*, 15 Cal.App.4th at p. 687.) As noted, the case was divided into three phases and three separate trials were held over a period of more than two years. The decisions in the three phases as well as other orders and stipulations, all of which were attached to and incorporated into the Judgment, totaled over 100 pages and resolved issues of property division, child custody and visitation, child support, spousal support, attorney’s fees and costs, and sanctions. The decisions rendered in the first two phases of the case specified that “no Judgment shall be prepared . . . until all other issues are tried and one judgment on all issues can be entered,” and in fact, only one “Judgment on Reserved Issues” was prepared and entered, after all three phases of the case were complete. The fact that the Phase III Decision contained a provision that the third trial was held “to determine all of the outstanding property division and support issues not otherwise resolved by the proceedings set forth above,” i.e., the Phase I Decision, Phase II Decision and other orders and stipulations,<sup>6</sup> also shows that Phase III was intended to resolve all remaining issues in

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<sup>5</sup> He does not contend, however, that the appeal should be dismissed on the basis that the order reallocating fees was not an appealable postjudgment order.

<sup>6</sup> Other orders and stipulations included a “May 2006 Settlement and Order,” an “Order After Hearing Re: Individual Retirement Accounts,” a “Stipulation & Order Re: Personal Property Arbitration,” a “further Stipulation and Order re Additional Arbitration Conditions and Provisions concerning the Personal Property Arbitration,” a “Nov. 2, 2006 Settlement,” a “Judgment Reforming and Enforcing Judicially Supervised November 2, 2006 Judicially Supervised Settlement Agreement and Order,” a “Findings and order Re Memorandum of Costs/Motion to Tax Costs and Response Thereto,” and a series of orders restraining certain accounts and authorizing that certain funds be withdrawn from those restrained accounts.

the case. The record supports the conclusion that the Judgment was indeed the “final judgment” in the case.

Judge Berra argues the Judgment was not final because the court reserved jurisdiction over several issues. He points out that the Judgment stated that a child support review hearing was going to be held in one year. He also notes the court retained jurisdiction “ ‘to divide any community assets not listed and to enforce the terms of this judgment’ ”<sup>7</sup> and “ ‘to implement and/or make such further orders as may be necessary to accomplish the terms’ ” relating to division of retirement accounts. Further, he asserts that the provision, “ ‘The Order Restraining Financial Accounts . . . shall continue in force until further order of the court,’ ” shows “ ‘[t]he judgment did not determine the parties’ rights and duties in regard to the restraining order.’ ”

Child support orders, however, are always subject to modification. (*In re Marriage of Armato* (2001) 88 Cal.App.4th 1030, 1039 [courts “retain jurisdiction over support orders even after a judgment of dissolution has become final and is no longer appealable”]; Fam. Code, § 3603 [a child support order “may be modified or terminated at any time”].) Further, family courts routinely retain jurisdiction to divide omitted assets (see Fam. Code, § 2556 [the family court has continuing jurisdiction to “award community estate assets or community estate liabilities to the parties that have not been previously adjudicated by a judgment in the proceeding”]) and enforce its prior orders (Fam. Code, § 290). Thus, the fact that the court retained jurisdiction to review the child support order, divide any omitted assets, or enforce its prior orders, did not render the Judgment interlocutory.

Judge Berra also argues the Judgment was interlocutory because it “was not a ‘final’ determination of the rights and duties of the parties.” He relies on the fact that the Register of Actions shows that several issues including child support review, a motion to set aside a portion of the Judgment, and substitutions of counsel, were heard after the Judgment was entered. “It has long been the general rule and understanding that ‘an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which

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<sup>7</sup> Judge Berra does not assert there were any specific “community assets” that were not included in the Judgment and remained to be divided.

were before the trial court for its consideration.’ ” (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) We therefore need not, and will not, determine whether the hearings held after the Judgment was entered show the Judgment was interlocutory.

Alternatively, Judge Berra argues that “California Rules of Court, Rule 2.832 permits the trial court’s order granting payment and reallocation of the fees and costs owed to Judge Berra.” However, the rule merely states that “[a] temporary judge selected by the parties may not be compensated by the parties unless the parties agree in writing on a rate of compensation that they will pay.” The fact that the parties in this case agreed to a certain hourly rate of compensation for Judge Berra’s services does not support Judge Berra’s position that the trial court had authority to reallocate his unpaid fees after Judgment was entered.

Judge Berra also argues the trial court had authority to reallocate his fees pursuant to the Stipulation. He relies on the following provision: “Each party shall be equally responsible for the payment of compensation of the Temporary Judge unless otherwise agreed to in writing by the parties or court order. Any disputes regarding the payment of the Temporary Judge’s fees shall be resolved by the Presiding Judge of the Superior Court.” Although the provision allows for reallocation of fees if “agreed to in writing by the parties or court order,” and requires that disputes regarding fees be resolved by the Presiding Judge, it does not allow the trial court to act in excess of its authority in reallocating fees after entry of judgment. Judge Berra asserts that the phrase, “[e]ach party shall be equally responsible” for his fees means the parties are jointly and severally liable for the fees. We believe the more reasonable interpretation is that the parties are to split the fees equally between themselves “unless otherwise agreed to in writing by the parties or court order,” not that they are jointly and severally liable for all fees.

Finally, Judge Berra asserts he was in a “predicament” because he “could not hold up the entry of the judgment pending payment as that would be in direct violation of [the Code of Ethics], requiring that a Judge’s judicial duties take precedence over his other activities” and requiring a judge to “ ‘dispose of all judicial matters fairly, promptly, and efficiently.” He states, “Waiting until Vincent paid Judge Berra’s fees could have taken



months or likely may have never occurred, thereby causing extreme damage to the parties, their financial resources, and most importantly, their children. Judge Berra signed the judgment despite the outstanding judge pro tem fees and costs in order to uphold his duty as temporary judge and properly serve under the canons of the California Code of Ethics. Judge Berra should not be penalized for abiding [by] his ethical duties.” However, Judge Berra is not being “penalized” for refusing to violate the Code of Ethics. In fact, the Code of Ethics has no bearing on this matter, as there was no need to “hold up the entry of the judgment.” Judge Berra, who admittedly knew before the Judgment was entered that the fees were unpaid, had the option of reallocating the fees at that time or including them in the Judgment as required by the Stipulation. Because he did not, the trial court lacked authority to require Ann to pay Vincent’s portion of the fees incurred prior to entry of the Judgment.<sup>8</sup>

#### **DISPOSITION**

The order is reversed to the extent it requires Ann S. Carrino to pay Vincent Carrino’s portion of judge pro tem fees that were incurred before the Judgment was entered on September 23, 2008. Ann shall recover her costs on appeal from Richard C. Berra.

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McGuiness, P.J.

We concur:

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Siggins, J.

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Jenkins, J.

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<sup>8</sup> The parties appear to agree the trial court had authority to reallocate fees incurred after entry of the Judgment.